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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

NO. 1193

JOHN LANE,

Petitioner

v.

STATE OF TEXAS,

Respondent

MOTION TO AFFIRM

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INDEX

	Page
STATEMENT	1
TEXAS STATUTE INVOLVED	2
ARGUMENT AND AUTHORITIES	3
CONCLUSION	9
CERTIFICATE OF SERVICE	10

INDEX OF AUTHORITIES

Cases:

	Page
Bachellar v. Maryland, 397 U.S. 564 (1970)	4
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)	4, 6
Cox v. Louisiana, 379 U.S. 536 (1964)	3, 6
Feiner v. New York, 340 U.S. 315 (1951)	7
Gregory v. City of Chicago, 394 U.S. 111 (1969)	3
United States v. Petrillo, 332 U.S. 1 (1947)	8
Zwicker v. Boll, 391 U.S. 353 (1968)	7

Statute:

Article 474, Section 1(5), Texas Penal Code ---- 2

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Appellee, The State of Texas, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment of the County Court at Law No. 1 of Travis County, Texas, be affirmed on the ground that the federal question is so insubstantial as not to warrant further argument.

STATEMENT

Appellant, John Lane, attended a University of Texas Board of Regents meeting. During the course of the meeting, when Regent John Peace was making a report to the Board, Lane leaped to his feet and screamed,

> "I can't stand this; this is bullshit and I can't stand it; let me out of here."

While moving and hopping about the meeting room, Lane shouted:

> "Frank, your death," or
> "Frank, you're dead."

(At the time, Frank Erwin was Chairman of the Board of Regents.)

In moving about, Lane had a brief skirmish with Musselwhite, a university lawyer, who attempted to trip Lane. Then a security guard grappled with Lane and removed him from the room.

Lane's conduct disrupted the meeting and brought it to a standstill for a time and further Lane's actions brought on the attempted tripping by the school lawyer and the scuffle with the security guard.

Lane was charged with disorderly conduct, found guilty in County Court at Law No. 1 of Travis County, and assessed a fine of $100.00.

THE TEXAS STATUTE INVOLVED

This appeal raises the question of the validity of a provision of the Texas "Disorderly Conduct" statute, Article 474, Subsection (5) of Section 1, which provides:

> "Article 474. Disorderly conduct.
>
> Section 1. No person, acting alone or in concert with others, may engage in disorderly conduct. Disorderly conduct consists of any of the following:
>
> ". . . . .
>
> "(5) in a public or private place engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance; or
>
> . . . . ."

ARGUMENT AND AUTHORITIES

1. *States Have the Power to Constitutionally Regulate and Punish Disorderly Conduct*

This Court has consistently recognized the power of the States to control disturbances and disorderly conduct which impinge on the rights of the public generally. In *Gregory v. City of Chicago,* 394 U.S. 111 (1969), it was observed (concurring opinion of Mr. Justice Black joined by Mr. Justice Douglas):

> ". . . we wish once more to say that we think our Federal Constitution does not render the States powerless to regulate the conduct of demonstrators and picketers, conduct which is more than 'speech,' more than 'press,' more than 'assembly,' and more than 'petition' as those terms are used in the First Amendment."

Mr. Justice Black further cited with approval the following language from *Cox v. Louisiana,* 379 U.S. 536, 554 (1964):

> "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy."

The Court's opinion in *Gregory* (the majority opinion) also recognized the authority to control disturbances, when, after noting that the conduct in question was "peaceful and orderly," the Court observed,

> "There is no evidence in this record that Petitioner's conduct was disorderly,"

implying certainly that disorderly conduct can be proscribed.

Again in *Bachellar v. Maryland,* 397 U.S. 564 (1970), this Court, while reversing the convictions involved, noted the continued efficacy of *Chaplinsky v. New Hampshire.* 315 U.S. 568, 574 (1942), which upheld the "fighting words" portion of the state breach of the peace statute because these such words (under the Chaplinsky holding) are,

> ". . . likely to provoke the average person to retaliation and thereby cause a breach of the peace."

It being well-settled that States have the authority to control conduct that threatens the peace, the inquiry herein must be directed to the Texas statute in question.

2. *The Texas Statute Should Be Found To Be Constitutional So As To Preserve The Rights Of Its Citizens To Be Free From Disturbances That Threaten The Existence Of The Society That Guarantees And Protects The Exercise Of The Right Of Free Speech*

In the present case, Petitioner was charged with engaging

> "in disorderly conduct . . . in a public place . . . the University of Texas Board of Regents meeting room (where he engaged) in boisterous and unreasonably loud conduct under circumstances in which such conduct tended to cause a disturbance."

The facts adduced at the trial showed that Petitioner's conduct was loud, his actions boisterous and that this conduct interrupted and brought the Regents

meeting to a halt and provoked a tripping attempt by a University lawyer and a grappling incident with a University security guard.

Surely, a State should not be powerless to make such conduct criminal, or the day is drawing closer where our society may be torn asunder.

Societies are formed by people to promote mutual protection and group cooperation in the fight for survival. Society must have rules which are imposed by the majority upon its members or the individual member may either contribute nothing to the society or be an actual, positive detriment to it. Along with the regulations set up by a society, it is desirable, as is done in this country, to permit the individual an area where he may disagree with the established practices and vocalize his disagreement or his suggestions for change. However, dissent and disagreement must in some wise be curbed at some point or there will never be concerted action, never be mutual enterprise, and so finally, no society. With the death of society, all individual rights which were granted and protected by the society will die. And perhaps the entire people that make up the society will succumb.

Today, the people of our society have never been so free. They have never had so many individual rights so diligently guarded by so many people and institutions. And also today, never has there been so much discontent, unhappiness, turmoil and actual violence. Never since the frontier days has there been so much danger to the members of this society as they walk the streets of this country and pursue their daily occupations.

Individual rights are important and desirable and free speech is certainly one of the most important of these individual rights.

The expression of unpopular ideas should not be curbed. But, when the manner and means of expressing ideas, thoughts and beliefs infringes on the rights of others (as Petitioner did here), society must have the authority to control the conduct involved.

In many areas, it is impossible to hold political conventions because the dissent insists on being heard at all times without giving other points of view the chance to be heard and considered. Church services have suffered from an overdose of freedom of speech and in some places and in some churches it is difficult if not impossible to hold an orderly church service. It has become increasingly difficult in many schools to conduct classes, and it would be indeed ironic to find that the exercise of the right of freedom of speech has destroyed education and the schools. It has even become difficult to conduct judicial business.

To repeat in part the language of *Cox v. Louisiana,* supra, 375 U.S. at page 554.

> "The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy."

3. *The Texas Disorderly Conduct Provision Involved Here Is Constitutional Under The Decisions Of This Court*

The portion of the Texas disorderly conduct statute in question in the present case prohibits loud and boisterous conduct in a public place which tends to cause or provoke a disturbance.

In *Chaplinsky v. New Hampshire,* supra, this Court considered a New Hampshire statute which provided that "no person shall address any offensive, derisive or annoying word to any other person who is lawfully

in any street or other public place, nor call him by any offensive or derisive name. . . ." The decision states, this was

> ". . . a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace. . . . This conclusion necessarily disposes of appellant's contention that the statute is so vague and indefinite as to render a conviction thereunder a violation of due process. A statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law."

In *Feiner v. New York,* 340 U.S. 315 (1951), this Court upheld a criminal conviction for violation of the following statute:

> "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:
>
> 1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;
>
> 2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;
>
> 3. Congregates with others on a public street and refuses to move on when ordered by the police; . . . . ."

A Wisconsin statute almost identical to the Texas statute now under consideration was before this Court in *Zwicker v. Boll,* 391 U.S. 353 (1968), affirming a three-judge district court decision, 370 F.Supp. 131 (W.D. Wisconsin 1967). The Wisconsin act read

> "947.01. Disorderly Conduct—Whoever does any of the following may be fined not more than $100

> or imprisoned not more than 30 days: (1) In a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance.

While the *Zwicker v. Boll* decision is not depositive of the present case since the constitutionality of the Wisconsin statute was intertwined with the propriety of issuing an injunction restraining the Act's enforcement, the case is, at least, persuasive authority for holding the Texas Statute constitutional. Parenthetically, it is interesting to note, that the Texas Legislature amended its disorderly conduct statute in 1969 to conform to the Wisconsin wording.

Whatever may be the significance of *Zwicker v. Boll,* the Texas disorderly statute is constitutionally valid. This Court, in *United States v. Petrillo,* 332 U.S. 1 (1947), page 7 of the opinion, laid down the standard by which to measure certainty and/or vagueness in criminal statute, stating,

> "The Constitution presents no such insuperable obstacle to legislation. We think that the language Congress used provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . . the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more."

Respondent submits that the Texas disorderly conduct provision meets the *Petrillo* constitutional measuring rod.

CONCLUSION

For the reasons advanced above, Respondent moves that the judgment of the Court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, attorney for Respondent, certify that a copy of the above and foregoing Motion to Affirm has been served on Petitioner by placing same in the United States Mail, postage prepaid, to Petitioner's attorney, Mr. Sam Houston Clinton, Jr., 205 Texas AFL-CIO Building, 308 West 11th Street, Austin, Texas 78701, this the ____ day of April, 1971.

LONNY F. ZWIENER
Assistant Attorney General